(2)

Supreme Court, U.S.
FILED
MAR 24 1997
CLERK

No. 96-1335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GREGORY ALAN SMITH,

Petitioner,

v.

METRO-NORTH COMMUTER RAILROAD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST DEPARTMENT

BRIEF IN OPPOSITION

MARK S. LANDMAN*
CATHLEEN A. GIANNETTA
LISA S. RABINOWITZ
LANDMAN CORSI BALLAINE & FORD P.C.
233 Broadway
New York, New York 10279
(212) 238-4800

Attorneys for Respondents

**Counsel of Record*

15 pp

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES ii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS TO DENY THE WRIT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Ancelet v. National R.R. Corp.,
913 F. Supp. 968 (E.D. La. 1995) 6

Bailey v. Missouri Kansas Texas R.R.,
732 S.W.2d 248 (Mo. App. 1987) 6,7

Baker v. Texas and Pac. Ry. Co.,
359 U.S. 227 (1959) 5,6

Barnes v. Chesapeake & Ohio Ry. Co.,
593 S.W.2d 510 (Ky. 1978), cert. denied,
441 U.S. 945 (1979) 6

Carey v. CSX Transportation, Inc.,
1995 WL 251145 (D. Md. 1995) 6

Del Vecchio v. Pennsylvania Railroad Company,
233 F.2d 2 (3d Cir.), cert. denied, 352 U.S. 909 (1956) . 7

Dougall v. Spokane, P. & S. Ry. Co.,
207 F.2d 843 (9th Cir. 1953), cert. denied,
347 U.S. 904 (1954) 7

Fawcett v. Missouri Pacific R.R.,
242 F. Supp. 675 (W.D. La. 1963), aff'd,
347 F.2d 233 (5th Cir. 1965), cert. denied,
382 U.S. 907 (1965) 6

Kelley v. Southern Pacific Co.,
419 U.S. 319 (1974) i,6,7,9

Moss v. Central of Georgia R.R.,
135 Ga. App. 904, 219 S.E.2d 593 (Ga. App. 1975),
cert. denied, 425 U.S. 907 (1976) 6

Okolinsky v. Philadelphia, Bethlehem & New England R.R.,
179 F. Supp. 801 (E.D. Pa. 1959), app. dism issued,
282 F.2d 70 (3d Cir. 1960) 7

Shenker v. Baltimore & Ohio R. Co.,
374 U.S. 1 (1963) 7,9

Smith v. Metro-North Commuter Railroad,
641 N.Y.S.2d 8 (1st Dep't 1996), app. denied,
No. 1297 (Ct. App. N.Y. Nov. 21, 1996) 7,9

Stiltner v. Norfolk & Western Ry Co.,
1994 WL 901187 (W.D. Va. 1994) 6,7

Williams v. Chicago & Eastern Illinois R.R. Co.,
13 Ill. App.3d 596, 300 N.E.2d 766 (Ill. App. 1973) . . . 6

Zarate v. Brownsville Navigation District,
768 S.W.2d 393 (Tex. App. 1989) 6

STATUTE

Federal Employers' Liability Act ("FELA"),
45 U.S.C. §§ 51, et. seq 5

QUESTION PRESENTED FOR REVIEW

Whether the New York Supreme Court, Appellate Division, properly found, consistent with Kelley v. Southern Pacific Co., 419 U.S. 319 (1974) and authority from numerous other jurisdictions, that as a matter of law, petitioner was not an employee within the jurisdiction of the Federal Employers' Liability Act at the time he sustained injury?

NO. 96-1335

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

GREGORY ALAN SMITH,

Petitioner,

v.

METRO-NORTH COMMUTER RAILROAD,

Respondent.

BRIEF IN OPPOSITION

Respondent, METRO-NORTH COMMUTER RAILROAD, ("defendant" or "respondent"), respectfully requests that this Court deny petitioner's request for a writ of *certiorari* to review the opinion below of the New York Supreme Court, Appellate Division. The opinion, dated April 9, 1996, is reprinted in the petition for *certiorari* at Appendix 5a.[1]

STATEMENT OF THE CASE

Gregory Alan Smith ("petitioner" or "plaintiff") was an employee of Asplundh Tree Expert Company ("Asplundh"), a company in the business of vegetation control, which had contracted with Metro-North to provide vegetative control

---

[1] "Appendix" refers to the appendix to the petition for certiorari.

services along its railroad tracks. (A-32-50).[2] On August 7, 1988, petitioner performed brush spraying operations on Metro-North's tracks near Milford, Connecticut, and as he rode on Asplundh's high-rail spray truck, he came into contact with an overhead high-voltage wire and sustained injuries.

On May 19, 1987, Asplundh and Metro-North entered into a General Services Contract, under which Asplundh was obligated to perform weed and brush spraying operations on certain Metro-North railroad tracks. (A-32-50). The contract provided, among other things, that Asplundh would defend and indemnify Metro-North for claims against it for injuries to Asplundh's employees arising out of their work (A-35), and that Asplundh was to obtain workers compensation insurance, employer's liability insurance, and occupational disease insurance. (A-48). The contract also specified that Asplundh's trucks be suitable for use on railroad tracks. (A-42-43).

Additionally, the contract provided that Asplundh:

> "shall operate as and have the status of, an independent contractor and shall not act as, or be, an employee or agent of Metro-North. Contractor shall employ, pay from its own funds, and discharge all persons engaged in the performance of the work to

---

[2] "A- " refers to the Appendix filed in the Supreme Court of New York, Appellate Division First Department.

> be performed hereunder, and such persons shall be under Contractor's supervision, direction and control subject to general oversight and guidance of Metro-North's Director of Contracts Administration & Procurement, or whomever he may appoint."

(A-32-33).

Petitioner began working for Asplundh in the early 1980s and developed his particular vegetation control skills specifically for his employment by Asplundh. (A-28; A-58-59; A-74-75). As an employee of Asplundh, petitioner performed vegetation control on the tracks of many different railroads. (See A-61, A-65). Asplundh trained its employees by conducting seminars, and it provided them safety handbooks and instruction use manuals. (A-58-59; A-74-75; A-82; A-119-120; A-128-129). One of these handbooks, the "Operator's Handbook" referred to by petitioner as "the Bible," detailed the duties and responsibilities of Asplundh employees. (A-74-79). Asplundh maintained daily activity logs and required its employees to perform daily inspections of the equipment used on specific jobs. (A-62-63; A-68; A-87). Asplundh determined the chemicals to be used on the Metro-North job and controlled the mixing processes for those chemicals. (A-83; A-86; A-95-96; A-124-127). Asplundh controlled the spraying operations, including the methods utilized by its employees in conducting spraying operations, and the materials and equipment to be used in spraying. (A-58-59; A-66-67; A-85; A-112-115; A-121; A-126-127; see A-119).

Asplundh hired its own employees. (A-119; A-190). Asplundh set their compensation and paid petitioner's salary. (A-190). Asplundh assigned its employees to specific jobs and specific shifts. (Id.). Asplundh had the authority to discipline its employees.

Metro-North designated the general geographical area (i.e., track routes) where chemical spraying was to be performed (A-92), and provided maps which indicated where the train lines began and ended. (A-83). Because Asplundh's work was performed in the area of Metro-North's active main tracks and to avoid interference with oncoming trains and to ensure the efficient operation of the railroad, Metro-North coordinated Asplundh's use of the tracks, and the movement of the Asplundh trucks on its tracks. (A-73; A-90-92; A-97; A-132-135; A-138-142; A-145-146; A-167).

Metro-North did not control the "actual spraying operation" at the time of petitioner's accident (A-161-162; see A-83-85). On August 7, 1988, the day of petitioner's accident, Asplundh assigned him to the brush spraying operation on which he was injured. On that day, another Asplundh employee, William Simmonds, assisted petitioner; both men were spraying the vegetation on the tracks with the chemical weed killers. (A-69-71). A Metro-North employee, Cornelius Vines, accompanied the two Asplundh workers to act as "pilot," ensuring that Metro-North could safely operate its trains while the weed killing operations were in progress (A-132; A-146), and that the Asplundh employees made proper use of Metro-North's tracks, so that they did not interfere with railroad operations. (A-64).

REASONS TO DENY THE WRIT

There are no issues presented by this case which raise any unsettled legal issue meriting review by this Court. The New York Supreme Court, Appellate Division, appropriately decided, based on the undisputed facts of the record below, that Metro-North did not exercise the requisite degree of control over petitioner's work to deem Metro-North his employer under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, et. seq. This determination was appropriately made by the court below because the case presented an instance where "reasonable [persons] could not reach differing conclusions" on the issue of petitioner's employment status. Baker v. Texas and Pac. Ry. Co., 359 U.S. 227, 228 (1959).

Although petitioner attempts to argue that there is an issue meriting review by this Court because this case arises under the FELA, this case presents nothing more than a routine granting of summary judgment. The Appellate Division's decision was based on long-standing precedent, including decisions of this Court, applying the FELA. Moreover, there is no split in the United States Courts of Appeals on this issue. Given the undisputed material facts, it was entirely proper for the Appellate Division to direct that judgment be entered in Metro-North's favor and deny petitioner's motion for leave to appeal to the New York Court of Appeals, and for the New York Court of Appeals to deny plaintiff leave to appeal. Because petitioner's contrary arguments are devoid of merit, his petition for a writ of certiorari should be denied.

Petitioner asserts self-servingly that the issue of employment status under the FELA must always be decided by the jury. (Petition at 16). But petitioner cites no authority which would support this unfounded assertion. Indeed, petitioner relies repeatedly on Baker, supra, 359 U.S. 227, 228, where this Court expressly recognized that not every case raising the issue of the existence of an employment relationship under the FELA merits determination by the jury. Accord Fawcett v. Missouri Pacific R.R., 242 F. Supp. 675 (W.D. La. 1963), aff'd, 347 F.2d 233 (5th Cir. 1965), cert. denied, 382 U.S. 907 (1965). Thus, numerous federal and state courts have granted summary judgment in favor of a defendant on the issue of a plaintiff's employment status under the FELA. See Ancelet v. National R.R. Corp., 913 F. Supp. 968 (E.D. La. 1995); Carey v. CSX Transportation, Inc., 1995 WL 251145 (D. Md. 1995); Stiltner v. Norfolk & Western Ry Co., 1994 WL 901187 (W.D. Va. 1994); Zarate v. Brownsville Navigation District, 768 S.W.2d 393 (Tex. App. 1989); Bailey v. Missouri Kansas Texas R.R., 732 S.W.2d 248 (Mo. App. 1987); Barnes v. Chesapeake & Ohio Ry. Co., 593 S.W.2d 510 (Ky. 1978), cert. denied, 441 U.S. 945 (1979); Moss v. Central of Georgia R.R., 135 Ga. App. 904, 219 S.E.2d 593, (Ga. App. 1975), cert. denied, 425 U.S. 907 (1976); Williams v. Chicago & Eastern Illinois R.R. Co., 13 Ill. App.3d 596, 300 N.E.2d 766 (Ill. App. 1973).

In reaching its decision, the Appellate Division was guided by well-established precedent addressing the issue of employment status under the FELA. To assert a claim against a railroad under the FELA, a plaintiff must show that he was an employee of the railroad at the time of his injury. Kelley v. Southern Pacific Co., 419 U.S. 319 (1974). The primary issue to be considered is the right of the railroad "to direct and

control the worker in the detailed performance of his work at the time of his injury." Bailey v. Missouri Kansas Texas Railroad, 732 S.W.2d 248 (Mo. App. 1987).

However, as this Court has recognized, a railroad must exercise some degree of control over contractors which come on its premises in order to ensure the safe operation of its rails, and a railroad's efforts to coordinate its ongoing operations with that of an independent contractor will not bring a plaintiff within the ambit of the FELA. See Kelley, supra, 419 U.S. at 329-31 (recognizing the "necessity of passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation"). Accord, Stiltner v. Norfolk & Western Ry. Co., 1994 WL 901187 at *2 ("the only control that [the railroad] had over the plaintiff was that which was necessary for the safe operation of the yard and the efficient use of [the contractor's] services"); see also Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1 (1963) (directions which were given by railroad to worker did not show necessary control or supervision to bring worker within the ambit of FELA, but were "at most an example of the minimum cooperation necessary to carry out a coordinated undertaking"); Del Vecchio v. Pennsylvania Railroad Company, 233 F.2d 2, 4-5 (3d Cir.), cert. denied, 352 U.S. 909 (1956); Dougall v. Spokane, P. & S. Ry. Co., 207 F.2d 843 (9th Cir. 1953), cert. denied, 347 U.S. 904 (1954); Okolinsky v. Philadelphia, Bethlehem & New England R.R., 179 F. Supp. 801 (E.D. Pa. 1959), app. dism., 282 F.2d 70 (3d Cir. 1960). Applying this analysis, the Appellate Division ruled correctly that the undisputed facts established that plaintiff was not an employee of Metro-North at the time he was injured. Smith v. Metro-North Commuter Railroad, 641 N.Y.S.2d 8, 9 (1st Dep't 1996), app. denied, No. 1297 (Ct. App. N.Y. Nov. 21, 1996).

Petitioner contends that this issue is worthy of review by this Court because in the cases upon which the Appellate Division relied, there was no railroad employee present at the time the petitioner was injured, whereas in the present case a Metro-North employee was acting as "pilot" of the truck at the time petitioner was injured. (Petition at 25-26). But the fact that a Metro-North employee sat in the passenger seat while another Asplundh employee drove the truck and petitioner did the weed spraying, does not, under well-established FELA law, mean that Metro-North had the requisite control over petitioner's work. It merely demonstrates, as the Appellate Division held, that a railroad's effort to coordinate its ongoing operations with the work of a independent contractor does not make the railroad the "employer" of the independent contractor's employee.

For railroad safety precautions and for efficiency in operating the railroad, it was obviously essential for Metro-North to decide where and when Asplundh's employees performed their tasks; otherwise, Metro-North would be impeded from functioning effectively. Petitioner cannot identify any evidence which indicates that the Metro-North pilot was also involved -- at the time of petitioner's accident -- in deciding which shrubs to spray or how to spray, let alone that the pilot did the spraying. Indeed, petitioner does not dispute that the pilot was in the passenger seat. It also is not disputed that petitioner was responsible for spraying the weeds; that the driver of the truck was an Asplundh employee; and that petitioner reported on a daily basis to his Asplundh supervisor, who was located at Asplundh's main offices in Pennsylvania.

As the Appellate Division recognized in its decision, these facts do nothing more than reflect a "railroad's efforts to

coordinate an independent contractor's work with its own ongoing operations . . . ." Smith, 641 N.Y.S.2d 8, 9. Accord, Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1 (1963). Obviously, someone from Metro-North had to be present during petitioner's work to make sure that the weed killing project never interfered with the efficient, continuous operation of the railroad. That effort, however, does not, as a matter of law, somehow operate, to create an employer-employee relationship for purposes of the FELA. Kelley, 419 U.S. at 329-31.

Although petitioner contends that factors relating to "general employment" are irrelevant in determining whether petitioner was an employee of Metro-North, (Petition at 29-30), courts have routinely cited these same factors in FELA employment status cases. See cases cited supra, p. 6. The Appellate Division properly relied on these factors to reach its decision.

Finally, petitioner attempts to lend significance to the issue of his employment status under the FELA by characterizing it falsely as one of "first impression," and by arguing that the Appellate Division has created "new" law in New York. (Petition at 32). But as discussed above, supra p. 6, this issue has been decided time and again by many courts across the country, and the Appellate Division properly relied on ample precedent in deciding the issue of whether petitioner was an employee of Metro-North. There is no issue of "first impression" presented here and there is nothing "novel" about the Appellate Division's decision.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

LANDMAN CORSI BALLAINE & FORD P.C.
Mark S. Landman*
Cathleen A. Giannetta
Lisa S. Rabinowitz
233 Broadway
New York, New York 10279
(212) 238-4800
Counsel for Respondents

**Counsel of Record*

Dated: March 21, 1997